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**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH LOVE,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0606-PC-298
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0211-PC-285934

April 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Joseph Love appeals the revocation of his probation. Love presents the following restated issue for review: Did the trial court err in denying his request for a continuance of the probation hearing?

We affirm.

Following his conviction of burglary as a class B felony, the trial court sentenced Love, on April 9, 2003, to ten years in prison. Four of those years were suspended with two years of probation. Love was released to probation on March 16, 2006.

Two weeks later, on the afternoon of March 30, 2006, Love entered an A.J. Wright Clothing Company with his daughter, sister, and niece. While in the store, Love took one of the store's jerseys to a secluded area. After successfully removing a security tag from the jersey, Love took the jersey to another area of the store, rolled it up, and "stowed it down the back of his pants". *Transcript* at 12. Love walked past all points of sale without paying for the jersey. After Love exited the first set of doors, Don Cloud, one of the store's loss prevention officers, stopped Love in the store's vestibule. Cloud had observed all of Love's actions with the store's security cameras. Thereafter, Love was arrested and charged with theft, a class D felony.

On April 6, 2006, the State filed a notice of probation violation, alleging in pertinent part that on or about March 30, 2006, Love was charged with theft, a class D felony. The court held the initial probation hearing on April 11, at which counsel was appointed and an evidentiary hearing was scheduled for May 5.

The probation revocation hearing took place as scheduled. At the outset of the hearing, the defense orally requested a continuance, which the trial court denied. Counsel

explained that the basis of Love's request was the failure of his sister, Joyce Love, to appear at the hearing pursuant to a subpoena. The court asked what her testimony would have been, and counsel responded:

She was in the store with Mr. Love at the time of the alleged, of the new allegations, the alleged theft. I'll – just for the sake of brevity I'll summarize – Mr. Love indicates he's in the store with his sister, his daughter and his niece. His daughter is young, said, you know, Daddy, I have to use the bathroom. The store clerk said, We [sic] don't have a bathroom that's working, you have to go next door. So he starts to take the little girl next door, forgets that he has on one of their shirts, that he has been trying on because they were buying clothes. The loss prevention officer stopped him at the door said, Hey, sir, you have on our shirt. He's like, I'm sorry, you know, I forgot, I gotta' hurry up and get her to the bathroom, she's got a weak bladder, if I don't get her there quickly she'll pee on herself. He takes the shirt off, gives it to him, but they call the police and that's how he's arrested for the theft charge.

Id. at 9. The court then heard testimony from Cloud, the State's sole witness.

Following the State's presentation of evidence, the court once again addressed the absence of Love's sister:

[COURT]: ...why isn't she here?
[COUNSEL]: I don't know. We had a telephone number for her, we attempted to call the phone number, it was disconnected, so we sent the subpoena to the address that we had and...
[COURT]: He had his initial on April the 11th.
[COUNSEL]: Right. And that's...
[COURT]: And I've got a very over-crowded jail right now and – but I will take your summary of what...
[COUNSEL]: The other thing...
[COURT]: ...she said – what you believe her testimony would be and I'll take that into account.

Id. at 17. Counsel then, once more, summarized the witness's expected testimony.

At the conclusion of the hearing, the trial court found, by a preponderance of the evidence, that Love had in fact committed the offense of theft. Accordingly, the court

revoked Love's probation and sentenced him to serve the suspended portion of his original sentence (that is, four years) in prison. Love now appeals.

Love challenges the denial of his oral motion to continue the hearing. In this regard, he initially contends that the denial "violated his federal due process right to present evidence on his behalf." *Appellant's Brief* at 3. In the alternative, Love argues that the court "abused its discretion under state statute" because he "presented all of the information necessitated by statute to secure a continuance based on his sister's failure to appear." *Id.* at 3-4. We will address each contention in turn.

With respect to his procedural due process argument, Love relies on *Brewer v. State*, 816 N.E.2d 514 (Ind. Ct. App. 2004). In that case, we recognized:

Our supreme court held that, "it is well settled that probationers are not entitled to the full array of constitutional rights afforded defendants at trial." *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999). However, "the Due Process Clause of the Fourteenth Amendment does impose procedural and substantive limits on the revocation of the conditional liberty created by probation." *Cox*, 706 N.E.2d at 549 (quoting *Braxton v. State*, 651 N.E.2d 268, 269 (Ind. 1995)). In probation revocation proceedings, our supreme court has described a defendant's due process rights as follows:

There are certain due process rights, of course, which inure to a probationer at a revocation hearing. These include written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body. Indiana Code § 35-38-2-3(e) also ensures the probationer the right to confrontation, cross-examination, and representation by counsel.

Id.

Brewer v. State, 816 N.E.2d at 516. Thus, *Brewer*, like Love, had a constitutional right to present witnesses on his behalf. Because the trial court refused to allow *Brewer* to

present his available witness,¹ we held that the court had denied his due process right to present witnesses. *Brewer v. State*, 816 N.E.2d 514.

The facts in *Brewer*, however, are clearly distinguishable from those before us. In *Brewer*, the witness was actually present at the probation hearing to testify on Brewer's behalf and the trial court refused to hear her testimony. This was a clear violation of Brewer's constitutional right to present evidence. On the other hand, in the instant case, Love's proposed witness, his own sister, was not present at the hearing to testify on his behalf. There was no indication that Joyce would be available to testify at some point in the near future, as Love had been unable to locate her. And it is not even clear from the record that Joyce had been properly served with the subpoena. Finally, despite Joyce's absence from the proceedings, the trial court expressly took into account her anticipated testimony as declared by Love's counsel. Under the circumstances, Love has failed to establish a violation of his right to present evidence.

¹ Upon being informed that Brewer's alleged victim of domestic violence was present to testify on his behalf, the court responded in part, "I don't care." *Id.* Later in the proceeding, when Brewer attempted to present the witness's testimony, the following occurred:

[THE COURT]: I don't care. I believe this because this is what happened at the time.

When she gets--see this is what happens in these domestic cases all the time.

[DEFENSE COUNSEL]: I understand Judge. Sometimes those things happen.

[THE COURT]: They get coerced into not saying what was right because they don't--because they are scared or whatever. I'm not going to have it, alright. So I believe it occurred. And I'm going to show that I find that the probable cause is sufficient that a crime has occurred. Probation is going to be revoked.

Id. at 517 (citation to record omitted).

Relying upon Ind. Code Ann. § 35-36-7-1, Love contends that the denial of his request for a continuance was an abuse of discretion. This statute provides in relevant part as follows:

- (a) A motion by a defendant to postpone a trial because of the absence of evidence may be made only on affidavit showing:
 - (1) that the evidence is material;
 - (2) that due diligence has been used to obtain the evidence; and
 - (3) the location of the evidence.
- (b) If a defendant's motion to postpone is because of the absence of a witness, the affidavit required under subsection (a) must:
 - (1) show the name and address of the witness, if known;
 - (2) indicate the probability of procuring the witness's testimony within a reasonable time;
 - (3) show that the absence of the witness has not been procured by the act of the defendant;
 - (4) state the facts to which the defendant believes the witness will testify, and include a statement that the defendant believes these facts to be true; and
 - (5) state that the defendant is unable to prove the facts specified in accordance with subdivision (4) through the use of any other witness whose testimony can be as readily procured.
- (c) The trial may not be postponed if:
 - (1) after a motion by the defendant to postpone because of the absence of a witness, the prosecuting attorney admits that the absent witness would testify to the facts as alleged by the defendant in his affidavit in accordance with subsection (b)(4); or

* * *

Contrary to his assertion on appeal, Love's oral request for a continuance did not, even "in substance", comply with his duties under the statute. *Appellant's Brief* at 6. For example, in addition to not filing an affidavit, Love wholly failed to indicate the probability of procuring Joyce's testimony within a reasonable time. *See* I.C. § 35-36-7-1(b)(2). Moreover, as set forth above, the trial court accepted counsel's synopsis of Joyce's anticipated testimony and considered the summary as if Joyce had so testified.

Therefore, postponement under the statute, even if applicable, would not have been warranted. *See* I.C. § 35-36-7-1(c)(1). Similarly, the denial of Love’s request for a continuance was not otherwise an abuse of discretion because he cannot establish prejudice. *See Anderson v. State*, 466 N.E.2d 27, 32 (Ind. 1984) (the denial of a continuance not based on statutory grounds is within the trial court’s discretion, and “[t]o overcome the court’s ruling it must be shown that the denial prejudiced the defendant”).

Judgment affirmed.

KIRSCH, J., and RILEY, J., concur.